Supreme Court, U.S.
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No. 00-1453

IN THE

Supreme Court of the United States

AARATHI DESAIGOUDAR, as Trustee of the
CHAN DESAIGOUDAR FOUNDATION,
a California Charitable Trust,

Petitioner,

v.

WADE MEYERCORD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Is a statement in a proxy solicitation concerning the disclosure of a corporate director's other directorships that might be in violation of Item 401(e)(2) of Regulation S-K (17 C.F.R. § 229.401(e)(2)) material as a matter of law under Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and Securities and Exchange Commission Rule 14-a (17 C.F.R. § 240.14a-9)?

Does an allegation of a possible misstatement in a proxy solicitation concerning a corporate director's other directorships effectively allege a *per se* violation of Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and Securities and Exchange Commission Rule 14-a (17 C.F.R. § 240.14a-9)?

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STATUTORY PROVISIONS

In addition to the statutory provisions set forth in the Petition, the following provisions are relevant.

1. 17 C.F.R § 240.14a-101 ("Schedule 14A"), which provides in pertinent part:

> Item 7. Directors and executive officers. If action is to be taken with respect to the election of directors, furnish the following information in tabular form to the extent practicable. If, however, the solicitation is made on behalf of persons other than the registrant, the information required need be furnished only as to nominees of the persons making the solicitation.
>
> (a) The information required by instruction 4 to Item 103 of Regulation S-K (§ 229.103 of this chapter) with respect to directors and executive officers.
>
> (b) The information required by Items 401, 404(a) and (c), and 405 of Regulation S-K (§ 229.401, § 229.404 and § 229.405 of this chapter).

2. 17 C.F.R. § 240.14a-9 ("Rule 14a-9"), which provides in pertinent part:

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any

> statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

3. 15 U.S.C. § 78u-4 (the "Private Securities Litigation Reform Act" or "PSLRA"), which provides in pertinent part:

> (b) Requirements for securities fraud actions
>
> (1) Misleading statements and omissions
>
> In any private action arising under this chapter in which the plaintiff alleges that the defendant —
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been

misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Aarathi Desaigoudar ("Petitioner") filed the original Complaint in this action in the United States District Court for the Northern District of California, San Francisco Division, on September 15, 1997, where the case was initially assigned to District Court Judge Samuel Conti (Case No. C-97-03379 SC). On October 8, 1997, Defendants and Respondents ("Respondents") filed a Motion to Transfer the case to the Northern District's San Jose Division. District Judge Conti granted the unopposed Motion to Transfer. Once at the San Jose Division, the case was assigned to District Court Judge James Ware.

On October 8, 1997, Respondents also filed a Motion to Dismiss for Failure to State a Claim ("Original Motion to Dismiss"). Petitioner proffered an "Amended Complaint" as an attachment to the Opposition to the Original Motion to Dismiss. The Court made its determination on the Original Motion to Dismiss in light of Petitioner's proffered Amended Complaint.

In the January 14, 1998 Order Dismissing Complaint, the district court dismissed, without leave to amend, Petitioner's claim under Section 10(b) of the Securities and Exchange act of 1934 (15 U.S.C. § 78j(b)) and Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. § 240.10b-5). The district court dismissed, with leave to amend, Petitioner's claim for alleged misrepresentation or omissions under Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and SEC Rule 14a-9 (17 C.F.R. § 240.14a-9). The district court cautioned, however, that Petitioner's amended pleading needed to adhere to the strict requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ("PSLRA") (15 U.S.C. § 78u-4), as well as with the requirements of Federal Rule of Civil Procedure 11.

On February 12, 1998, Petitioner filed another Amended Complaint, which featured the third iteration on Petitioner's Section 14(a) claim. Respondents and the Court, as a result, referred to the "Amended Complaint" as the "Second Amended Complaint." Respondents brought a Motion to Dismiss the Second Amended Complaint on March 2, 1998, which was heard by the district court on October 14, 1998. Subsequently, the district court granted the Motion to Dismiss without leave to amend on October 16, 1998.

Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeal on November 9, 1998. The Court of Appeal heard oral argument on February 17, 2000. The Court of Appeal filed its opinion affirming the district court's Order Granting Defendants' Motion to Dismiss on September 8, 2000. *See* Petition Appendix A; *see also Desaigoudar v. Meyercord*, 223 F.3d 1020 (9th Cir. 2000). Petitioner filed a Motion to Stay Mandate Pending the Filing of a Petition for Writ of Certiorari in the Supreme Court on January 2, 2001, which was granted by the Court of Appeal on January 12, 2001. Petitioner also filed a Petition for Rehearing and for Rehearing En Banc on or about October 10, 2000. This petition, which raised the same argument concerning the representation that Respondent Angel Jordan was a director of Keithley Instruments, Inc. ("Keithley") that Petitioner has raised in the Petition for Writ of Certiorari, was denied by the Court of Appeal on December 22, 2000.

B. Nature Of The Case.

In the Second Amended Complaint, Petitioner alleged that Respondents, who are current and former officers and directors of California Micro Devices Corporation ("CMD"), purportedly violated Section 14(a) and Rule 14a-9 by failing to inform CMD shareholders, pursuant to a proxy solicitation, that CMD had disposed of its investment in a company called CellAccess Technology, Inc. ("CellAccess") for less than its alleged value. Petitioner also alleged that Petitioners violated Section 14(a) and Rule 14a-9 by failing to disclose duties of Defendant and Respondent Angel Jordan with respect to his position on the Pittsburgh High Technology Council, which Petitioner alleged created some kind of conflict of interest.

In the section of the Second Amended Complaint identifying the parties, Petitioner also mentioned in passing that CMD's March 3, 1995 10-K filing represented that Respondent Jordan was a director of Keithley, but noted that Keithley's December 1995 10-K filing did not list Respondent Jordan as a director. Although Petitioner's Second Amended Complaint made much of Respondent Jordan's participation on the Pittsburgh High Technology Council, no further mention of his directorship, or lack thereof, at Keithley was made in the Second Amended Complaint. The Court of Appeals held that the Second Amended Complaint failed to include any allegations showing the materiality of alleged misrepresentations concerning Respondent Jordan's directorship at Keithley. *See* Petition Appendix B at 13a-14a.

REASONS FOR DENYING THE WRIT

Plaintiff and Petitioner Aarathi Desaigoudar petitions this Court for a Writ of Certiorari on the grounds that the decision by the Ninth Circuit Court of Appeal affirming the district court order dismissing Petitioner's Second Amended Complaint with prejudice failed to apply the correct standard of materiality to an alleged misrepresentation in the 1995 proxy solicitations for CMD. Specifically, Petitioner argues that the Court incorrectly held that the information in the proxy solicitations regarding Defendant and Respondent Angel Jordan's affiliation with Keithley was immaterial as a matter of law because the representation at issue was purportedly in violation of the requirements in Regulation S-K concerning the disclosure of directorships (17 C.F.R. § 229.401(e)(2)).

Petitioner's arguments in support of a Writ of Certiorari fail on several accounts. First, the Second Amended Complaint failed to plead any facts establishing the materiality of the

information concerning Jordan's affiliation with Keithley to any shareholder voting decision at issue in the Second Amended Complaint. Second, even if the materiality of this information was somehow in question, the Second Amended Complaint failed to include allegations setting forth the other elements of a claim under Section 14(a) of the Securities and Exchange Act of 1934 (the "Exchange Act"). Particularly given the pleading requirements under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the Court of Appeals' decision that, after giving Petitioner three chances to state a claim under Section 14(a), the district court was correct to dismiss the Second Amended Complaint with prejudice was correct. Accordingly, this Court need not review the well reasoned decision of the Court of Appeal and should instead deny the Petition for Writ of Certiorari.

A. Pleading A Claim Under Section 14(a) And Rule 14a-9.

1. Elements Of A Claim Under Section 14(a) And Rule 14a-9.

Section 14(a) of the Exchange Act provides that

> it shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or . . . otherwise, in contravention of such rules and regulations as the Commission may prescribe . . . , to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security.

The corresponding SEC Rule 14a-9 prohibits the solicitation of proxies through statements or omissions of material fact that are false or misleading when made. 17 C.F.R. § 240.14a-9.

Section 14(a) is intended to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431, 84 S. Ct. 1555 (1964).

To make out a claim under Section 14(a) and Rule 14a-9, a plaintiff must demonstrate that the alleged proxy solicitation contained a false or misleading statement of *material* fact, or omitted to state a *material* fact necessary to make the statement in the solicitation not false or misleading. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 440, 96 S. Ct. 2126 (1976). A plaintiff must also show that the misstatement or omission of a material fact was the result of knowing, reckless or negligent conduct. *See, e.g., Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 189-90 (3d Cir. 1988), *cert. denied*, 489 U.S. 1054 (1989). Finally, a plaintiff must demonstrate "transaction causation" — that the proxy solicitation itself was an "essential link" in the accomplishment of the transaction at issue. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385, 90 S. Ct. 616 (1970). Moreover, a plaintiff must also plead the elements of falsity and scienter with the particularity required under the PSLRA. 15 U.S.C. § 78u-4(b)(1)-(2).

2. Materiality Under Section 14(a) And Rule 14a-9.

Courts evaluating materiality under Section 14(a) make an "objective" determination "involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Indus.*, 426 U.S. at 445. Accordingly, a fact omitted from a proxy statement "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. This standard

requires that a plaintiff show that there is "substantial likelihood that, *under all the circumstances*, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder," i.e., that the information would have "significantly altered the 'total mix' of information made available." *Id.* (emphasis added).

B. Regulation S-K Does Not Supplant The Materiality Requirements Under Section 14(a).

The essence of Petitioner's argument is that the requirements under Regulation S-K (17 C.F.R. § 229.401) regarding required disclosures in proxy solicitations pursuant to Schedule 14A (17 C.F.R. § 240.14a-101) supplant the requirements of materiality that otherwise govern claims under Section 14(a) and Rule 14a-9.[1] Not surprisingly, Petitioner cites to no authority for the premise that disclosures required under Regulation S-K or Schedule 14A are somehow exempt from the materiality requirements set forth both on the face of Rule 14-a[2] and in this Court's own decisions.

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1. In the Petition for Writ of Certiorari, Petitioner does not raise the question of whether litigants have a private cause of action that arises solely under Item 401(e)(2) of Regulation S-K, as opposed to arising under Section 14(a) or other securities laws providing for private causes of action. Likewise, Petitioner never raised this issue with either the district court or Court of Appeals. Accordingly, this Court need not address this issue in ruling on the Petition.

2. 17 C.F.R. § 240.14a-9 ("Rule 14a-9") provides that:

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the

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In a decision addressing the materiality of disclosures mandated by Item 303 of Regulation S-K with respect to a claim under Rule 10b-5 (17 C.F.R. § 240.10b-5), the Third Circuit held that the " 'the demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5 [because] [s]uch a duty to disclose must be separately shown.' " *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (quoting from *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 608 (N.D. Cal. 1991)). As a result, the Third Circuit in *Oran* held that "a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5." 226 F.3d at 288.

The same reasoning applies to a disclosure required under Item 401 of Regulation S-K and the materiality requirements for stating a claim under Section 14(a) and Rule 14a-9. The mere fact that a disclosure violated Item 401 of Regulation S-K, or that it *might have violated* this regulation as in the present case, does not necessarily make the particular disclosure material with respect to a proxy solicitation. To find otherwise would lead invariably to absurd results. For instance, Item 401(a) of Regulation S-K mandates the disclosure of the ages of corporate directors.

(Cont'd)

> circumstances under which it is made, is false or misleading with respect to any *material fact*, or which omits to state any *material fact* necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy. . . .

(Emphasis added.)

17 C.F.R. § 229.401(a). If a proxy statement were to misstate the age of a director, there is no reason to assume that shareholders would consider the information relevant to each and every issue up for shareholder vote.

C. The Second Amended Complaint Did Not Allege That Angel Jordan's Directorship At Keithley Was Material, Or Even False, Under Section 14(a).

The Second Amended Complaint alleged that CMD's March 1995 Form 10-K filing — not even the proxy statement itself — described Respondent Jordan as a director of Keithley. Petitioner alleged that Keithley's own Form 10-K in December 1995 did not list Respondent Jordan as a director, but Petitioner did not allege that Jordan was not, in fact, a director of Keithley as of March 1995. Likewise, Petitioner did not allege in the Second Amended Complaint that CMD shareholders considered information concerning Jordan's directorship at Keithley in deciding how to vote, or even that a hypothetical "reasonable shareholder" would have done so. Further, Petitioner did not even allege that CMD's Form 10-K formed any part of CMD's 1995 proxy solicitation or was otherwise considered by shareholders in determining how to vote on any matters up for shareholder approval in 1995.

As the Second Amended Complaint does not allege that any misstatements concerning Angel Jordan's affiliation, or lack thereof, with Keithley appeared in the 1995 proxy statement, Item 401(e) of Regulation S-K is irrelevant to the evaluation of Petitioner's allegations. Although Schedule 14A (17 C.F.R. § 240.14a-101) does require that certain information listed in Item 401 of Regulation S-K (17 C.F.R. § 229.401) be included in a proxy statement, the Second

Amended Complaint does not even allege that the 1995 proxy statement itself failed to contain accurate information concerning Jordan's directorships.

D. Information Concerning Jordan's Directorship At Keithley Was Not Material As A Matter Of Law.

Even had the Second Amended Complaint alleged that the 1995 proxy statement contained inaccurate information concerning Jordan's directorship at Keithley, the Second Amended Complaint nonetheless had no allegations establishing the materiality of such information. The gravamen of the Second Amended Complaint was that the Defendants failed to disclose information concerning CMD's disposition of its investment in CellAccess in the 1995 proxy solicitations in order to obtain shareholder approval of a stock option plan. Nowhere did the Second Amended Complaint make any connection between approval of the stock option plan and biographical information concerning Respondent Jordan.

Likewise, the mere fact that Item 401(e)(2) of Regulation S-K requires disclosure of directorships does not automatically render such information material to a particular shareholder vote. *See Oran*, 226 F.3d at 287-88. As this Court made clear in *TSC Industries*, specific information in proxy solicitations is to be viewed in its context as part of the "total mix" of information before the shareholders. 426 U.S. at 449. There was simply nothing in the Second Amended Complaint to support even a weak inference that Respondent Jordan's directorship at Keithley in any way affected the decision of CMD shareholders to approve the stock option plan or to take any other action.[3]

3. The only conceivable relevance of Jordan's professional affiliations would be to his election as a director. The Second (Cont'd)

E. The Second Amended Complaint Also Failed To Allege Other Key Elements Of A Section 14(a) Claim.

Even had the Second Amended Complaint managed to allege that the information concerning Jordan's affiliations was material to CMD's shareholders in approving the stock option plan in 1995, the claim would nonetheless have failed as Petitioner did not allege other key elements of a claim under Section 14(a). For instance, the Second Amended Complaint does not allege that information concerning Jordan's affiliation with Keithley was false at the time of the June/July 1995 proxy solicitation as there was nothing in the Second Amended Complaint indicating that he was not a director of that company in March 1995, only that a December 1995 filing indicates that he was not. Likewise, the Second Amended Complaint did not allege who, among the defendants, was responsible for any statements concerning Jordan in the proxy solicitations or elsewhere, or that any such misrepresentations were made with the requisite scienter. Under the PLSRA, plaintiffs seeking relief under Section 14(a) and Rule 14a-9 cannot only make bare allegations of scienter, but must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

The Court of Appeals found not only that Petitioner's Second Amended Complaint had failed to plead a

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Amended Complaint alleged no such connection or materiality, however, and *did not even challenge CMD's 1995 election of directors*. Even if the Second Amended Complaint had waged such a challenge, it would be necessarily moot as more than five years have now passed and subsequent elections of directors have already taken place.

Section 14(a) claim, but that "no amendment could save Desaigoudar's complaint." Petition Appendix A at 14a. Accordingly, this Court need not review the discrete issue put forward by the Petition for Writ of Certiorari as even a resolution of said issue in Petitioner's favor would not ultimately result in a change in the Court of Appeals' decision affirming dismissal with prejudice.

CONCLUSION

For the reasons set forth above, this Court should deny Petitioner Aarathi Desaigoudar's Petition for Writ of Certiorari.

Respectfully submitted,

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